



LOOPSTRA NIXON LLP

MUNICIPAL AND PLANNING LAW NEWSLETTER

APRIL 2006

PRIVATE SECTOR

VOLUME I NUMBER I

Bill 51: Land Use Planning and OMB Reform

On December 12, 2005, the Provincial Government tabled Bill 51 for first reading, *The Planning and Conservation Land Statute Law Amendment Act, 2005* which will have a profound impact on the land use planning process in Ontario.

Bill 51 is the second phase of planning reform which builds on the significant changes implemented in *The Strong Communities (Planning Amendment) Act, 2004*, (Bill 26). Bill 26 included measures that restricted appeals of urban expansion for official plan and zoning by-law amendments, increased the time available for municipalities to review planning applications before they can be appealed to the OMB, amended the language in the *Planning Act* to require that land-use planning decisions be “consistent with” rather than “have regard to” the Provincial Policy Statement, and protected broader public interests by enabling the Minister to advise the OMB if a proposed official plan, zoning by-law or related amendments are matters of provincial interest and decisions respecting such matters would then be subject to confirmation by the Lieutenant Governor in Council.

Bill 51 proposes to significantly reduce the OMB’s authority and role in the land use planning system and provide greater deference to the local municipal planning process. Greater clarity and details of the proposed reforms will be set out by regulation and therefore it may be difficult to provide a comprehensive analysis until the regulations are released. One important matter that certainly requires clarification is the impact of the proposed changes existing applications and appeals, or those initiated prior to the effective date of the bill.

Bill 51 proposes a number of fundamental changes including:

OMB Reform

- The OMB would be required to “have regard to” any planning decision made by a municipal council and to any supporting information and material that the council considered in making its decision;
- Persons who did not make oral or written submissions at the local approval process will not be permitted to appeal the matter to the OMB

unless the OMB determines there are “reasonable grounds” to add the person as a party;

- There would no longer be any right of appeal to the OMB from applications to amend official plans or zoning by-laws that remove any land from an “area of employment”;
- The OMB would have no authority to approve or modify any part of an official plan that is already in effect and was not dealt with in the municipal council’s decision;
- Evidence at OMB appeals will be restricted to information and material that had been before council unless the OMB determines that it was not “reasonably possible” to provide such information to the municipality before council’s decision. Public bodies would be excluded from the restriction. In the event the OMB determines that any new information or materials could not have been reasonably provided to the municipality prior to the decision of council and such information and materials could have “materially affected council’s decision”, it shall not be admitted into evidence until council has been notified and provided the opportunity to reconsider its decision and make a written recommendation to the Board within a prescribed time period;
- The OMB would be provided with the enhanced authority to dismiss repeat applications on the grounds of an abuse of process.
- On related appeals, where a variance or consent appeal is made in addition to an official plan, rezoning, site plan or subdivision application, the OMB would retain jurisdiction to hear the variance or consent appeal
- Municipalities can establish and appoint a local appeal body to hear variance and consent appeals subject to the prescribed regulation which will set out qualifications, eligibility and rules of practice and procedure. The OMB would remain the appeal body where municipalities opt not to establish its own local appeal body;

Land Use Planning Process

- All decisions on planning matters must be consistent with provincial policy statements and conform to provincial plans in effect on the date of the decision;

- Municipalities would be required to update their official plans every five years to conform with provincial plans, to be consistent with Provincial Policy Statements and have regards to matters of provincial interest and to update all zoning by-laws within three years thereafter to conform to the revised official plan;
- Enhance the prescribed information and material that would need to be submitted with an official plan amendment, rezoning, subdivision or consent application;
- Municipalities may also set out in the official plan other information or material requirements with respect to amendments to official plans. A municipality does not need to accept or consider an application unless the materials and information required by regulation or the official plan have been provided to the municipality and appeal periods would not begin to run until the same has been provided;
- Municipalities that initiate official plans or zoning by-law amendments are subject to enhanced notification and consultation requirements. In addition to a public meeting, municipalities must also hold an “open house” which is not defined under the legislation;
- Municipalities may pass “pre-consultation” by-laws requiring prospective applicants for an official plan amendment, rezoning or plan of subdivision to consult with the municipality prior to filing the application.

Development Controls

- Municipalities may establish minimum and maximum densities and heights in zoning by-laws as well as the minimum area of the parcel of land;
- Municipalities may impose conditions when approving zoning applications and register the agreement between the owner and municipality on title with respect to such conditions. The scope of such conditions will be prescribed by regulation however, the background materials reference energy efficiency and brownfields cleanup;
- Subdivision plans must now consider efficient use and energy conservation and municipalities may now require the dedication of pedestrian and bicycle paths and public transit right-of-ways;
- The exterior design of a proposal touching upon the character, scale, appearance and sustainable design features of building can now be subject of site plans approvals and agreements;
- Bill 51 expressly excludes interior design, interior layout (excluding walkways, stairs, elevators and escalators) and the manner and standard of construction from site plan control;
- Colour, texture and type of materials, window detail and architectural design may now be part

of the site plan process since Bill 51 removes their previous exclusion under the *Planning Act*.

Conclusion

Bill 51 proposes to fundamentally alter the land use planning process by attempting to provide greater deference to local municipal councils. It will be vitally important to include legal counsel at the front end of the application and decision-making process, and to utilize counsel who have effective legal and negotiation skills and strong political instincts with a proven track record of achieving results before the local municipal council. Until the legislation is clarified by the prescribed regulations or by amendments in committee, there are a number of significant issues:

- The mandatory comprehensive five-year official plan review and requirement to update zoning by-laws within three years are ambitious time frames, which may prove quite costly and require additional resources for municipalities;
- Many of the front end loading decision-making proposals and limitations on appeal rights may lead to greater unintended costs for municipalities, such as costs of enhanced and detailed record keeping at public meetings.
- Whether council will be bogged down given the scope of information that councils will be required to consider;
- Concerns have been raised on the limitations of evidence used before the OMB. Bill 51 essentially requires an applicant to file an entire OMB case before the municipality reaches a decision. Disputes may arise regarding new evidence and whether it was “not reasonably possible” to provide the information and material to council and if such evidence “could have materially affected the council’s decision”. There is also concern that where new evidence is remitted back to council for reconsideration, this will lead to a prolonged and costly yo-yo effect between council and the OMB;
- Provincial policies and plans in force at the time of the decision are to be applied rather than the long-standing approach of applying the policy in effect at the date of the application.

For further information on Bill 51 and other important changes implemented by the Provincial government to the land-use planning system, please contact a member of the Loopstra Nixon LLP Municipal and Planning Law Group.

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